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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 CHRISTOPHER JOHN TROTTER,

12 Petitioner,

13 v.

14 SUPERIOR COURT OF CALIFORNIA,  
15 CALAVERAS COUNTY,

16 Respondent.  
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Case No. 1:21-cv-00570-DAD-HBK

FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITION FOR FAILURE TO  
EXHAUST CLAIM AND TO DISMISS  
CLAIM AS PROCEDURALLY BARRED<sup>1</sup>

OBJECTIONS DUE IN TWENTY-ONE  
DAYS

(Doc. No. 1)

20 Petitioner Christopher John Trotter, a state prisoner proceeding *pro se*, has pending a  
21 petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1). This matter is before  
22 the Court for preliminary review. *See* Rules Governing § 2254 Cases, Rule 4; 28 U.S.C. § 2243.  
23 Under Rule 4, a district court must dismiss a habeas petition if it “plainly appears” that the  
24 petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019);  
25 *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Courts have “an active role in  
26 summarily disposing of facially defective habeas petitions” under Rule 4. *Ross v. Williams*, 896

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28 <sup>1</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302  
(E.D. Cal. 2019).

1 F.3d 958, 968 (9th Cir. 2018) (citation omitted). As more fully set forth herein, based on the facts  
2 and governing law, the undersigned recommends that the Petition be dismissed because the sole  
3 ground for relief raised in the Petition is unexhausted and now procedurally barred.

## 4 **I. BACKGROUND**

5 Petitioner initiated this case on April 4, 2021 by filing the instant petition. (Doc. No. 1,  
6 “Petition”). Petitioner is currently serving an eight-year prison sentence entered by the Calaveras  
7 County Superior Court on October 5, 2018 for his *nolo contendere* plea-based conviction for  
8 arson. (*Id.* at 2). The Petition raises one ground for relief. (*Id.* at 3). Specifically, Petitioner  
9 claims that he is being denied certain incarceration credits to which he is entitled. (*Id.*). Attached  
10 to the Petition is a copy of Petitioner’s plea proceedings during which the court and counsel  
11 reviewed and discussed the various credits due to Petitioner. (Doc. No. 1-1).

## 12 **II. APPLICABLE LAW AND ANALYSIS**

13 A petitioner in state custody who wishes to proceed on a federal petition for a writ of  
14 habeas corpus must exhaust state judicial remedies. *See* 28 U.S.C. § 2254(b)(1). Exhaustion is a  
15 “threshold” matter that must be satisfied before the court can consider the merits of each claim.  
16 *Day v. McDonough*, 547 U.S. 198, 205 (2006). The exhaustion doctrine is based on comity and  
17 permits the state court the initial opportunity to resolve any alleged constitutional deprivations.  
18 *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 518 (1982).  
19 To satisfy the exhaustion requirement, petitioner must provide the highest state court with a full  
20 and fair opportunity to consider each claim before presenting it to the federal court. *See*  
21 *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan v. Henry*, 513 U.S. 364, 365 (1995).  
22 The burden of proving exhaustion rests with the petitioner. *Darr v. Burford*, 339 U.S. 200, 218  
23 (1950) (overruled in part on other grounds by *Fay v. Noia*, 372 U.S. 391 (1963)). A failure to  
24 exhaust may only be excused where the petitioner shows that “there is an absence of available  
25 State corrective process” or “circumstances exist that render such process ineffective to protect  
26 the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

27 Petitioner states he sought relief for this same claim at the state appellate court, but he  
28 acknowledges he has not sought review in the state supreme court. (Doc. No. 1 at 3); *see People*

1 *v. Trotter*, No. C089651 (Cal. App. 3d 2021). Indeed, Petitioner indicates that the state appellate  
2 court denied him relief on February 26, 2021. (*Id.*). The court takes judicial notice of the  
3 California Courts Appellate Courts Case Information online database pursuant to Rule 201 of the  
4 Federal Rules of Evidence, which lists no supreme court cases for petitioner.<sup>2</sup> Because it appears  
5 Petitioner has failed to exhaust his claim, the undersigned recommends the court dismiss the  
6 petition because the sole ground for relief is unexhausted. If Petitioner presented his claim to the  
7 California Supreme Court, he should provide proof of this filing to the court in his objections to  
8 these findings and recommendations.

9 Furthermore, given the date in the Petition that the state appellate court denied petitioner's  
10 claim on appeal (February 26, 2021), it appears that petitioner's sole ground for relief is now  
11 procedurally barred. Federal review of the merits of a claim is barred where the state would  
12 apply a mandatory rule of procedure that would preclude a petitioner from raising his claim in  
13 state court. *See Moreno v. Gonzalez*, 116 F.3d 409, 411 (9th Cir. 1997); *Johnson v. Lewis*, 929  
14 F.2d 460, 462–64 (9th Cir. 1991). Here, Petitioner's state direct appeal was complete on March  
15 26, 2021. Under California state procedural rules, his petition for review was due in the  
16 California Supreme Court 40 days later, no later than April 7, 2021. *See* Cal. R. Ct. 8.366(b)(1);  
17 8.500(e)(1)-(2) (A criminal appeal is final 30 days after the filing of the appellate opinion; a  
18 petition for review before the California Supreme Court is due 10 days after the appellate decision  
19 is final and the time to file a petition for review may not be extended absent a rare circumstance).  
20 Accordingly, unless Petitioner can avail himself of one of the rare circumstances to excuse his  
21 untimely filing of his petition for review in the California Supreme Court, his sole ground for  
22 relief would be procedurally barred from federal habeas review.

### 23 III. CERTIFICATE OF APPEALABILITY

24 State prisoners in a habeas corpus action under § 2254 do not have an automatic right to  
25 appeal a final order. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36  
26 (2003). To appeal, a prisoner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2);

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28 <sup>2</sup> <https://appellatecases.courtinfo.ca.gov/search.cfm?dist=0> (search "Search by Party" for "Christopher Trotter").

1 *see also* R. Governing Section 2254 Cases 11 (requires a district court to issue or deny a  
2 certificate of appealability when entering a final order adverse to a petitioner); Ninth Circuit Rule  
3 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). Where, as here, the court  
4 denies habeas relief on procedural grounds without reaching the merits of the underlying  
5 constitutional claims, the court should issue a certificate of appealability only “if jurists of reason  
6 would find it debatable whether the petition states a valid claim of the denial of a constitutional  
7 right and that jurists of reason would find it debatable whether the district court was correct in its  
8 procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar  
9 is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist  
10 could not conclude either that the district court erred in dismissing the petition or that the  
11 petitioner should be allowed to proceed further.” *Id.* Here, reasonable jurists would not find the  
12 undersigned’s conclusion debatable or conclude that petitioner should proceed further. The  
13 undersigned therefore recommends that a certificate of appealability not issue.

14 Accordingly, it is RECOMMENDED:

- 15 1. The petition (Doc. No. 1) be DISMISSED.
- 16 2. Petitioner be denied a certificate of appealability.

#### 17 NOTICE TO PARTIES

18 These findings and recommendations will be submitted to the United States district judge  
19 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-one  
20 (21) days after being served with these findings and recommendations, a party may file written  
21 objections with the court. The document should be captioned “Objections to Magistrate Judge’s  
22 Findings and Recommendations.” Parties are advised that failure to file objections within the  
23 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
24 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: June 22, 2021

  
HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE